74-1552

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

JOHN HARDER, Commissioner of the Connecticut State Welfare Department

Petitioner,

against

CLEO JOHNSON, individually and on behalf of her minor dependent children and in behalf of all others similarly situated

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered March 26, 1975.

OPINIONS OF THE COURTS BELOW

The opinion of the United States District Court for the District of Connecticut is reported in 383 F. Supp. 174. A copy of this opinion is annexed as "Appendix B" (p. 3a).

The opinion of the Court of Appeals for the Second Circuit has not yet been reported (____ F.2d ____). A copy of this opinion is annexed as "Appendix A" (p. 1a).

JURISDICTION

The judgment of the Court of Appeals was entered on March 26, 1975. The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does 42 U.S.C. § 405(j) contain language which would create either a spendthrift trust, discretionary trust, or a trust for support; or does the language of that statute merely create a fiduciary relationship between the representative payee and the beneficiary of Title II social security monies?

2. If there is no restraint on alienation in the language of 42 U.S.C. § 405(j), does the Secretary of Health, Education and Welfare, pursuant to 42 U.S.C. § 1302, have the

power to create a spendthrift trust, a discretionary trust, or trust for support by regulation?

3. Does 42 U.S.C. § 407 apply to a situation, such as appears in this present civil action, where there has been no assignment of future payments, or any attempt to execute, levy, attach or garnish Title II funds, but where the State Welfare Department's policy mandates that the recipient must first support those for whom he is legally liable out of surplus Title II funds before the State Welfare Department pays the balance of the support out of Aid to Families with Dependent Children funds?

4. If the Secretary of Health, Education and Welfare has the power to create a restrictive trust by regulation, or 42 U.S.C. § 407 applies to Title II funds in the factual situation presented in this case, does 42 U.S.C. § 602(a)(7) prevent the Secretary from applying said regulations and § 407 in a situation involving the support of an Aid to Families with Dependent Children family?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutes involved are Section 17-320 of the Connecticut General Statutes; and 42 U.S.C. § 405(j), 42 U.S.C. § 602(a)(7), and 42 U.S.C. § 1302. The constitutional provision is the Supremacy Clause of Article VI of the United States Constitution.

STATEMENT OF THE CASE

This litigation arises out of the following Stipulation of Facts:

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

CIVIL ACTION FILE NO. 13765

March 22, 1974

MRS. CLEO JOHNSON, individually, and on behalf of her minor dependent children and in behalf of all others similarly situated

Plaintiff

v.

JOHN HARDER, Commissioner of the Connecticut State Welfare Department

Defendant

STIPULATION OF FACTS

1. Mrs. Cleo Johnson has ten children:

Evelyn D. Reddick	Marianne Johnson
Frances M. Johnson	Alesia Lyn Johnson
Ralph Edward Johnson	Steven W. Johnson
Kevin Johnson	Tammy Johnson
Twanna Johnson	Duane Johnson

2. Two of the children, Marianne and Frances, each receive Old Age, Survivors and Disability Insurance (hereinafter referred to as OASDI) payments of $103.00 per month. Mrs. Cleo Johnson is the representative payee.

3. The eight other children receive Aid to Families with Dependent Children benefits (hereinafter referred to as AFDC), as an eight person household, of $505.23.

4. If Mrs. Johnson were included in the Aid to Families with Dependent Children household the grant would be $547.36.

5. Mrs. Johnson filed her request for a fair hearing on this matter in June of 1969.

6. The plaintiff, Mrs. Cleo Johnson, is the legally dependent parent of the plaintiff children, Marianne and Frances, and has been the legally dependent parent of said children since December 31, 1970.

7. The defendant has interpreted that State law and that I. Connecticut State Welfare Manual, Chapter 3, Sections 330, 331, 335, 335.16 and 370 and that 20 C.F.R. 404.1607 and that the Federal Social Security Act allow the defendant to apply part of the Social Security payments of the plaintiffs, Marianne and Frances, beneficiaries under the Social Security Act, in the manner hereinafter described.

8. Since December 31, 1970 the defendant has applied part of the Social Security payments of the plaintiffs, Marianne and Frances, beneficiaries under the Federal Social Security Act, for the support and budgeted needs of the plaintiff, Cleo Johnson, which needs were computed according to Connecticut State Welfare departmental standards.

9. The part of the Social Security payments of the plaintiffs, Marianne and Frances, so used by the defendant for the support and budgeted needs of the plaintiff, Cleo Johnson, which needs were computed according to State Welfare departmental standards, was and is that part of the said Social Security payments which exceeds the budgeted needs of said children, Marianne and Frances, as computed according to State Welfare departmental standards.

10. As said part of the Social Security payments of the plaintiffs, Marianne and Frances, so used for the support

and budgeted needs, as computed according to State Welfare departmental standards, of the plaintiff, Cleo Johnson, have always met the budgeted needs of Cleo Johnson since December 31, 1970, the defendant discontinued the plaintiff, Cleo Johnson, from the AFDC monthly cash award effective December 31, 1970 to the present time.

11. The said computed needs according to Connecticut State Welfare departmental standards for the plaintiff, Cleo Johnson, is presently $56.71.

12. The said computed budgeted needs according to Connecticut State Welfare departmental standards for each of the children, Marianne and Frances, is presently $56.71.

13. State Welfare policies I. Connecticut State Welfare Manual, Chapter 3, Sections 330, 331, 335, 335.16 and 370 have state wide application.

The pertinent Connecticut State Welfare Department policy applicable to this case is set forth in "Appendix B" (p. 5a, footnote 4).

REASONS FOR GRANTING WRIT

I.

Certiorari should be granted in this case because the District Court and Court of Appeals have incorrectly found that the Secretary of Health, Education and Welfare has a power, pursuant solely to 42 U.S.C. § 1302, to make regulations which affect the substantive rights of states participating in the Aid to Families with Dependent Children programs. This finding was made even though the pertinent Social Security statutes did not authorize the particular regulations involved.

The State of Connecticut, pursuant to Section 17-320 of the Connecticut General Statutes, makes children liable for the support of indigent parents under the age of sixty-five. "Appendix C" (p. 17a).

The Connecticut Supreme Court has held that this statute makes a minor child liable for the support of an indigent parent out of both the child's income and assets; and the mere fact that a child is not in a state of affluence or that his contribution may impair his accumulated savings or capital, is not sufficient to release him from the performance of his statutory duty. *Bradley* v. *Fenn*, 103 Conn. 1, 130 Atl. 126.

Based on the authority of this statute and Connecticut Supreme Court case, the Connecticut State Welfare Department has promulgated policy that makes children support that parent, who is a supervising relative under the AFDC program, out of any surplus from Title II Social Security income to which the child may be entitled even though it forces the child to live at the state welfare standard. "Appendix B" (p. 5a, footnote 4).

The Department of Health, Education and Welfare, pursuant to 20 C.F.R. § 404.1602-404.1610, "Appendix D" (p. 19a) sets out the duties of a representative payee who receives money on behalf of a beneficiary of Title II monies. The statutory basis for these regulations purports to be 42 U.S.C. § 405(j).

This statute, which allows payments to the representative payee for "the use and benefit" of a beneficiary of Title II monies, merely sets up a fiduciary relationship between the parties which requires the representative payee to use the care of an ordinary fiduciary in handling the Title II monies.

What Health, Education and Welfare has done, through its regulations and State Letter No. 1088, see "Appendix E", (p. 25a) is to turn 42 U.S.C. § 405(j) into a discretionary trust or trust for support. 20 C.F.R. § 404.1603 says that the money shall be spent on the beneficiary in the "manner and for the purpose determined by him (representative payee) to be in the beneficiary's best interest". 20 C.F.R. § 404.1607 gives the representative payee the sole discretion to pay for the support of persons for whom the beneficiary may be legally liable.

The pertinent part of State Letter No. 1088 states as follows:

> "In view of the statutory requirement that a child's OASDI benefits be for his 'use and benefit' alone, the representative payee may not be required to use such benefits for other members of the child's family."

The Court should note that State Letter No. 1088 claims that its authority for this sentence is based on a statutory requirement when there is no language in § 405(j) authorizing this restrictive type of handling of Title II monies.

The American Law Institute, Restatement of the Law of Trusts, 2nd Edition, 1959, Section 154 entitled "Support Trusts" makes it clear that in order to set up a trust for support, the trustee is ordered to pay only as much as is *necessary* for the education or support of the beneficiary from income or principal from the trust. If the whole income belongs to the beneficiary, then the trust is not a trust for support, but belongs to the beneficiary, and is, therefore, alienable and attachable. See also Scott on Trusts, 3rd Edition, 1967, pages 1178-1179. *Slattery* v. *Wason*, 151 Mass. 266, 23 N.E. 843, 843.

The language of 42 U.S.C. § 405(j) gives the whole income to the beneficiary, and, because of that fact, is not a trust for support. In Illustration 4 on page 322 in the Restatement of the Law of Trusts, the language "for her comfort and support", which is similar to the language in § 405(j) "for his use and benefit", was held not to set up a support trust with the result that the monies were alienable, transferable and reachable by creditors.

Neither is there any language in § 405(j) setting up a discretionary trust. See Scott, supra, Section 155, page 1180. Restatement of the Law of Trusts, Section 155. *Foley* v. *Hastings,* 107 Conn. 9, 14, 139 Atl. 305, 306. *Estate of Canfield,* ____ Cal. Rptr. ____, 181 P.2d 732, 733.

Finally, there is no language in § 405(j) which sets up a spendthrift trust. Restatement of the Law of Trusts, supra, Section 152. Scott, supra, Section 152. *Bridgeport* v. *Reilly,* 133 Conn. 31, 47 A.2d 212.

Because there is absolutely no language in § 405(j) restricting the use of Title II monies paid to the beneficiary through a representative payee, the critical question in this present civil action is whether 42 U.S.C. § 1302 gives the Secretary of Health, Education and Welfare the power to restrict this money by regulation.

The Petitioner agrees that great deference should be paid to an agency's interpretation of statutes concerning that agency. Nevertheless, the interpretation must be a reasonable one. *Udall* v. *Tallman,* 380 U.S. 1, 16. The Petitioner further agrees that the Legislature can delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. However, the Legislature cannot delegate its power to make a law. *Field* v. *Clark,* 143 U.S. 649, 694. The Petitioner believes that the Secretary of Health, Education and Welfare has no power

to interpret § 405(j) in such a way as to change what Congress evidently intended to set up, as a simple fiduciary relationship, into a restrictive trust, and that such interpretation is unreasonable. The result is that Health, Education and Welfare has not just interpreted a statute but has made substantive law affecting the state's power to collect support from certain relatives.

If Congress intended to give this meaning to § 405(j), particularly as it affects state power to seek support from the children of indigent parents, a recent Supreme Court decision in the welfare field has held that Congress must make its meaning clear.[1]

> "If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed." *New York State Department of Social Services* v. *Dublino,* 413 U.S. 405, 413.

The admonition in *Dublino* should be read along with Supreme Court cases which recognize the greater power a state has in allocating its welfare funds.

> "The starting point of the statutory analysis must be the recognition that the federal law gives the state great latitude in dispensing its available funds." *Dandridge* v. *Williams,* 397 U.S. 471, 478. *Jefferson* v. *Hackney,* 406 U.S. 535, 541.

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[1]This Court in *Employees of Department of Public Health* v. *Missouri,* 411 U.S. 279, 284-285, held that where Congress may place new fiscal burdens on a state, it will not be presumed to take such action silently. Here the Petitioner is prevented from collecting necessary funds by HEW regulations.

Further, it would seem that the power given the Secretary of Health, Education and Welfare in § 1302 does not allow him to change the clear meaning of a statute. It gives him the power to publish laws and regulations, "not inconsistent with this chapter, as may be necessary to the *efficient administration* of functions with which (he) is charged under this chapter." (emphasis added) The reasonable meaning of the words "efficient administration" must be interpreted as limiting the Secretary's power to making regulations in a procedural sense, not a substantive sense, except in those situations where a particular Social Security statute clearly gives him that power.

In this case, the Secretary has made regulations without clear statutory basis which nullified the right of the state to pursue its historic right to seek support from different categories of relatives.

II.

Certiorari should be granted in this case because the Court of Appeals misapplied *Philpott* v. *Essex County Welfare Board,* 409 U.S. 413, to the facts in this present civil action.

Although the District Court did not cite *Philpott* or 42 U.S.C. § 407 as a basis for its decision, the respondent raised this defense in its Appellees' Brief before the Court of Appeals, and that Court cited *Philpott* as an additional reason for upholding the District Court's decision.

The Petitioner believes that *Philpott* is not similar to the factual situation set forth in this present civil action. Also, the Petitioner believes that *Philpott* should be reexamined because that decision failed to apply the rule of ejusdem generis to the words "other legal process" in § 407, and that it further drew an incorrect analogy with the veterans benefits exemption statute when it cited *Porter* v. *Aetna Casualty Co.,* 370 U.S. 159.

The reason Petitioner believes this case should be distinguished from *Philpott* is that in *Philpott* the County Welfare Board took an assignment from the application for welfare before they would give him any benefits. The language in § 407 clearly forbids any assignment of future benefits. *Philpott* could have been decided on this issue without any of the obiter dicta that was brought into the case as additional justification for the decision.

In the present case the state has sought no security on future payments from Title II monies by means of any legal process such as assignment or garnishment. The state has merely required that the representative payee pay the legal obligations of the beneficiaries when he receives the Title II funds.

As Petitioner will point out in his next argument, this requirement appears to carry out the Congressional policy mandated in 42 U.S.C. § 602(a)(7).

Even if the factual situation were not that distinguishable from *Philpott,* Petitioner strongly urges the Court to reexamine that case. Counsel for the County Welfare Board in its appeal to the Supreme Court never raised the issues or cited the supporting cases that Petitioner now raises in this argument.

The problem in *Philpott* is that Mr. Justice Douglas appears to give the words "other legal process" a meaning considerably more sweeping that that allowed under the rules of statutory construction, and much more sweeping than other case decisions dealing with money paid situations under § 407.

Under the *Philpott* interpretation of the words "other legal process" it would seem that no one could ever bring any kind of legal action against a recipient of Title II monies and collect out of these funds no matter how long the funds

had been in a bank account, or even if the funds ceased having the quality of money and were changed to other personalty or real property, so long as it could be shown the funds were originally Title II monies.

This interpretation runs completely counter to the general rule of interpreting similar phrases running in sequence in a statute.

The pertinent language in § 407 is ". . . shall not be subject to levy, attachment, garnishment or other legal process. . . ." It is obvious that the words "other legal process" as used in this section are limited in their meaning to a civil process used to secure the money before an adjudication on the merits, and does not mean every legal action that could be brought against a Title II beneficiary including one to enforce payment for support of a relative.

The rule of ejusdem generis must be applied here to carry out the correct Congressional intent. In fact, Courts have specifically applied this rule to this very phrase in § 407.

> "It is a well recognized rule of statutory construction that where specific words of the same nature are used in a statute, followed by general ones, those general ones take their meaning from specific ones." *Sparks* v. *Celebreeze*, 338 F.Supp. 508, 513; Affirmed 342 F.2d 286.

Every case, which has dealt with an interpretation of § 407, has held that this statute relates only to rights to future payments out of Title II funds and does not apply to monies paid. *Beers* v. *Federal Security Administration*, 172 F.2d 34, 36. *Ewing* v. *Gardner*, 185 F.2d 781, *Sparks*, supra.

Petitioner further believes that drawing an alalogy between *Philpott* and *Porter* was incorrect. The language of § 407 is completely different from the language of 38 U.S.C.

§ 3101, the statute interpreted in the *Porter* case. The pertinent language of § 3101 is as follows:

> "Nonassignability and exempt status of benefits
>
> (a) Payments of benefits due or to become due under any law administered by the Veterans' Administration shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary."

None of this sweeping language appears in § 407, and it is of interest that the predecessor statutes to § 407 and § 3101 were passed respectfully on August 14, 1935 and August 12, 1935 by the same Congress. If Congress, therefore, intended that § 407 have the same restrictive effect that § 3101 is specifically given, it would seem logical that § 407 would have been written in the same language. Legislative bodies are presumed to know what legislation is presently before them, and also what legislation is on the statute books.

For the reasons given, the Petitioner believes that *Philpott* should not be applicable to the factual situation involved in the present civil action.

III.

Certiorari should be granted in this case because the lower courts failed to find that 42 U.S.C. § 602(a)(7) overrides 42 U.S.C. § 407 and Health, Education and Welfare's regulatory interpretation of 42 U.S.C. § 405(j).

Even if § 405(j) and § 407 could be read as restricting a representative payee from paying a beneficiary's legal obligations, it would seem that in those cases, where a family

was on AFDC, Congress did not intent Title II monies to have this exemption but intended all monies with the exception of those exempt in § 602(a)(8)(A) to be used for the support of the family.

There is no question that 42 U.S.C. § 602(a)(7) mandates that all income except certain *earned* income, which is exempt pursuant to § 602(a)(8)(A) and certain optionally exempt income pursuant to § 602(a)(8)(B), "shall" be used for the family's needs in the preparation of the AFDC budget.

The pertinent language of § 602(a)(7) is as follows:

> "(a) A State plan for aid and services to needy families with children must (7) except as may be otherwise provided in clause (8), provide that the State agencies shall, in determining *need*, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or any other individual (living in the same house as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, . . ." (Emphasis added)

The word "need" which the Appellant has italicized in the above excerpt from the statute, clearly modifies the phrase "needy families with children". It does not modify the individual child or relative.

Not only would it be a violation of the ordinary rules of English grammar to say that it modified the individual child or relative, but this construction would make the phrase "in determining need", surplusage because the clause would make perfect grammatical sense without it. The clause would read:

> "(a) A State plan for aid and services to needy families with children must (7) except as may be otherwise provided in clause (8), provide that the State agencies shall take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or any other individual (living in the same house as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, . . ."

With this clause left out then, there would be no question that the needs discussed would be the needs of the individual child or relative claiming aid.

Therefore, it follows that Congress contemplated, when passing this Act, that some members of an AFDC family might receive surplus monies from some other source over and above their pro-rata share of the AFDC budget, and that this surplus was to be used in arriving at the total family need; and the fact that an individual beneficiary in the family unit has enough income to be removed from the program should not mean that this former beneficiary can now keep that surplus income from being considered in making up the AFDC budget for the rest of the family.

That Congress never intended to grant broad powers to the Secretary of Health, Education and Welfare to promulgate regulations on what should be done with surplus money coming into an AFDC family, regardless of the source, is clear from the language of § 602(a)(8)(B) which allows the State the option, subject "to the limitations prescribed by the Secretary" to set aside further excess funds for the child.

The Court should note that the Secretary has the power to only limit the amount the State has the option to allow

the child. There is no language in § 602(a)(8)(B) that enlarges the Secretary's power to make the State disregard more money than it desires.

Further, this option, which belongs to the State only, negates the lower court's interpretation of 20 C.F.R. § 404.1603 which appeared to give this power exclusively to the representative payee. In fact, if 20 C.F.R. § 404.1603 were as limited by statute as the lower court and State Letter No. 1088 claim, then § 404.1607 would be inconsistent with the so-called "statutory requirement."

There is no question, if the Johnson children had received money as the result of an inheritance or other windfall, 42 U.S.C. § 602(a)(7) would mandate that this money be used for the support of the mother in order to reduce the burden on the taxpayers, and also to allow the welfare monies to be used for those persons who really need it.

There is no public policy served by the Health, Education and Welfare regulation 20 C.F.R. § 404.1603 when applied to a situation such as is presented in this civil action.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that his petition for a writ of certiorari be granted.

Respectfully submitted,

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Dated:

APPENDIX A

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 598 — September Term, 1974.

(Argued March 21, 1975 Decided March 26, 1975.)

Docket No. 74-2424

CLEO JOHNSON, ET AL.,
Plaintiffs-Appellees,

v.

JOHN HARDER,
Defendant-Appellant.

Before:

KAUFMAN, *Chief Judge*, SMITH, *Circuit Judge*, and MACMAHON, *District Judge.**

Appeal by Harder from a judgment by the United States District Court for the District of Connecticut, M. Joseph Blumenfeld, *J.*, enjoining Connecticut regulations treating Old Age, Survivors, and Disability Insurance benefits received by minor children under 42 U.S.C. § 402(d) (1970) as available to meet the need of their mother with respect to AFDC payments.

Affirmed.

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*Of the Southern District of New York, sitting by designation.

FRANCIS J. MACGREGOR, *Assistant Attorney* General, Hartford, Connecticut (Robert K. Killian, Attorney General, on the brief), *for Appellant.*

NORMAN J. JOHNSON, Westbury, Connecticut (Waterbury Legal Aid, on the brief), *for Appellees.*

PER CURIAM:

This case was affirmed in open court. In order to afford our decision precedential value[1], however, and conclusively to resolve this issue within our circuit, we issue this brief per curiam. For the reasons stated by Chief Judge Kaufman in open court[2], we affirm on Judge Blumenfeld's opinion below, 383 F.Supp. 174 (D. Conn. 1974).

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[1]Rule §0.23 of the United States Court of Appeals for the Second Circuit provides in pertinent part:

> . . .
> Where a decision is rendered from the bench, the court may deliver a brief oral statement . . . . Since these statements do not constitute formal opinions of the court and are unreported and not uniformly available to all parties, they shall not be cited or otherwise used in unrelated cases before this or any other court.

[2]The statement delivered from the bench was as follows:

> We agree with Judge Blumenfeld that the Connecticut regulations conflict with the federal scheme for providing OASDI benefits. The federal statutes and regulations, taken in conjunction with *Philpott* v. *Essex County Welfare Board*, 409 U.S. 413 (1973), evidence a clear intention that OASDI funds be used for the beneficiary's needs, as he or his representative payee may best determine. It would subvert this scheme to permit a state to automatically treat such benefits as available for the needs of a parent or of other children. We are buttressed in our opinion by the interpretive letter written by John Costa, the administrative official charged with interpreting the OASDI provisions, whose views are entitled to great weight. Accordingly, we affirm on Judge Blumenfeld's opinion below.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

CIVIL NO. 13,765

MRS. CLEO JOHNSON, individually, and on behalf of her minor dependent children and in behalf of all others similarly situated
Plaintiff

v.

JOHN HARDER, Commissioner of the Connecticut State Welfare Department
Defendant

MEMORANDUM OF DECISION ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

This case involves a Connecticut welfare regulation which provides that OASDI (Old Age, Survivors, and Disability Insurance) benefits received by a parent as representative payee for her children may be included as income to her to the extent that the benefits exceed the budgeted needs of the children as determined by the State Welfare Department for the purpose of determining her eligibility for assistance under the State's AFDC (Aid to Families with Dependent Children) program. The plaintiffs assert that this regulation is in conflict with the Social Security Act and the regulations issued pursuant to it and violates their equal protection and due process rights under the Fourteenth Amendment and 42 U.S.C. § 1983 (1970). The case is before this Court now on plaintiffs' motion for summary judgment.

I.

Plaintiff Cleo Johnson is suing on behalf of herself, her minor dependent children and other members of the already

certified class. By stipulation of the parties and order of this Court, that class has been defined as consisting "of minors who are beneficiary members of AFDC family units, in cases in which the OASDI benefits available to such minors of the unit are applied by the Department of Welfare as funds available to the support of a Supervising Relative who is a needy parent of the minors."

The situation of plaintiff Johnson and her children is truly typical of the class which they represent. There is no dispute as to the following facts involving her situation and the relevant State and federal laws which affect it. Mrs. Johnson is a resident of Waterbury, Connecticut and a mother of ten children who reside with her. Two of those children, Frances and Marianne, receive OASDI benefits in the amount of $103.00 per month to which they became entitled upon the death of their father in 1963.[1] Mrs. Johnson receives the payments due to these children by virtue of her appointment as representative payee under the terms of 20 C.F.R. § 404.1601 (1974).[2] Under 20 C.F.R. § 404.1603 (1974), Mrs. Johnson, as representative payee, is charged with the responsibility of using such payments only for the "use and benefit of such beneficiary in the manner and for the purposes determined by [her] to be in the beneficiary's best interest."

---

[1]The children are entitled to receive these benefits under the provisions of 42 U.S.C. § 402(d) (1970).

[2]20 C.F.R. § 404.1601 (1974) provides:

> "When it appears to the Administration that the interest of a benificiary entitled to a payment under title II of the Act would be served thereby, certification of payment may be made by the Administration, regardless of the legal competency or incompetency of the beneficiary entitled thereto, either for direct payment to such beneficiary, or for his use and benefit to a relative or some other person as the "representative payee" of the beneficiary. When it appears that an individual who is receiving benefit payments may be incapable of managing such payments in his own interest, the Administration shall, if such individual is age 18 or over and has not been adjudged legally incompetent, continue payments to such individual pending a determination as to his capacity to manage benefit payments and the selection of a representative payee."

Mrs. Johnson and her other eight children have no source of income other than the assistance they receive from the State under the AFDC program.[3] In determining the amount of welfare assistance for a family unit, the State measures the needs of the unit versus its available income. It then provides AFDC assistance in the amount of the difference between these two figures. Such a computation is required by 42 U.S.C. § 602(a)(7) (1970) which provides that in determining the eligibility or amount of aid of any family assistance unit, the State must "take into consideration any other income and resources of any child or relative claiming aid to families with dependent children . . . ." In reliance upon this provision, the State Welfare Department has adopted Regulation 335.16(VI) of the Connecticut Welfare Manual, the full text of which is set out in the margin.[4]

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[3]The State provides assistance under a plan approved by the Secretary of Health, Education and Welfare as being in compliance with the requirements of 42 U.S.C. § 602 (1970).

[4] "VI. *Application of a Child's OASDI Benefits*

1. Application of available OASDI benefits will be made, first, to the needs of the child receiving the OASDI benefit. These include food, clothing, personal expenses and prorated share of rent, heat, utilities, household supplies plus any special recurrent expenses such as school transportation, special diet, etc.
2. If the OASDI benefits are insufficient to meet the child's needs computed in accordance with departmental standards, the child and Supervising Relative are eligible for AFDC.
3. If the OASDI benefit fully meets the child's needs, computed in accordance with departmental standards, and there is a surplus remaining, the surplus is allocated to the support of a Supervising Relative *who is a needy parent.*
4. If the OASDI benefit fully covers both a child and parent's needs computed according to departmental standards, and there are no remaining eligible members, an award is denied or discontinued.
5. If the OASDI benefit fully covers both the child and parent's needs, computed according to departmental standards, both are removed as eligible members and a grant is continued to meet the needs of any remaining eligible members. However, a parent may be given the option of continuing eligibility for herself and child if she believes this more advantageous and beneficial to the child;

in this case, a family assistance plan is prepared and the OASDI benefit reflected as income.

6. If the surplus OASDI benefit does *not* fully cover the parent's need, an assistance plan is computed covering the needs of parent and child, and an award is granted or continued in the amount of the resulting deficit. If the surplus does not fully cover the needs of a parent but fully meets the need of the eligible child, a parent may choose to have assistance for the child in receipt of the OASDI benefit discontinued but elect continuing eligibility for herself and any remaining eligible children. In this kind of situation, the surplus OASDI over and above that needed to meet a child's needs, computed according to departmental standards, would still be allocated toward the support of the parent and reflected as income against the assistance plan for the parent and remaining eligible children.
7. If the Supervising Relative is *other than a parent*, and an OASDI benefit fully covers the needs of an only eligible child, there is no case eligibility and the needy relative is referred to the town for assistance with her needs. However, if such a needy relative believes it advantageous and beneficial to the child's welfare, she may voluntarily elect to have an assistance plan computed according to assistance standards which reflect her needs and the child's needs; in such a situation, a child's OASDI benefit is applied to the assistance plan and an award is granted or continued in the amount of the deficit.
8. In the case of removal of an eligible child receiving OASDI benefits from the assistance plan, and there is continuation of an assistance payment to a needy parent for other eligible children, any surplus in the child's OASDI benefit will be allocated to any unanticipated, non-recurring needs that may occur, such as need for a bed, school clothing, etc. before allocation toward a needy parent's support — for the month or duration of this special need.
9. In situations where removal of a child is requested by a Supervising Relative, that is, when the child's needs are fully covered by his OASDI benefit, and the Supervising Relative has the alternative of continued eligibility for the child based on the deficit in the Supervising Relative's needs, the worker should carefully point up to the Supervising Relative the need to consider the fact that the child's removal eliminates the possibility of departmental assistance with any special needs of the child that may arise in the future, such as a prorated share of any payments for increased rent, excess utilities, moving costs, or any item of essential furniture or other individualized special needs that arise. The worker should also point up the fact that continuing eligibility for Food Stamps will be determined on a "Mixed household" basis, and in some instances, this could result in eligibility for a lesser amount of Food Stamp purchasing power. The foregoing is equally applicable to the situation where an OASDI benefit fully meets both the child and parent's needs and there is continuing eligibility of other eligible members.

In denials, discontinuances and removals of an eligible child or of a child and parent not only the effect upon Food Stamp eligibility but also upon eligibility for Title XIX should be evaluated and a Title XIX application processed when need and eligibility is evident.

NOTE: Although Index No. 335.16, VI has been written with reference to one eligible child in receipt of OASDI benefits, this policy material is equally applicable when there are additional eligible children in receipt of an OASDI benefit."

(Emphasis in original).

Essentially, this regulation covers the situation wherein a parent whose family is eligible for AFDC assistance is also the representative payee of one or more of her children who is receiving OASDI benefits. If the amount of the OASDI benefits exceeds the needs of the child beneficiary, as determined by the State Welfare Department, then the "surplus" is considered available income to the supervising relative (not, however, to any other relatives in the unit who are not in the "supervisory" position). This has the effect of either diminishing the size of any AFDC payments to which the supervising relative would be entitled if that "surplus" were not considered available income to her or rendering her entirely non-eligible. Furthermore, even if the parent were to exercise the option of removing the OASDI beneficiaries from the AFDC family assistance unit, the regulation provides that the "surplus" OASDI benefits would still be imputed to her.

In the case of Mrs. Johnson and her family, the defendant's application of the regulation has had a substantial financial impact. If the "surplus" OASDI benefits received by her on behalf of her two children were not imputed to her as available income, her family assistance unit, including her and her eight other children, would be receiving $547.36 per month. However, because of the operation of the regulation, her needs are considered to have been met by the "surplus" OASDI benefits and so the needs of her family unit are measured only by the remaining needs of her other eight children. As a result, the family's monthly benefits are only $505.23.

II.

Plaintiffs challenge this regulation on two distinct constitutional grounds. First, they argue that the regulation violates their rights to equal protection of the law because the assessment made against children who receive OASDI benefits is not made against other similarly situated children who have income from other sources. For example, they point out that all of the income of a full-time student between the ages of fourteen and twenty-one is disregarded when computing the needs of the other members of his family. More significantly, State regulations provide that the first $250.00 per month of income of a legally liable relative who resides with an AFDC eligible family is exempt from consideration as income of the family. Secondly, plaintiffs argue that the regulation violates their right to due process in that it establishes an irrebuttable presumption that the "surplus" OASDI income is actually available to meet the needs of the needy, supervising relative. *Cf. United States Department of Agriculture* v. *Murry,* 413 U.S. 408 (1973). Plaintiffs also challenge the regulation as being in violation of the Social Security Act and the reguations issued pursuant to it.

The plaintiffs' constitutional claims are not insubstantial. Accordingly, this Court has jurisdiction of this action under 28 U.S.C. § 1343(3) and consequently has jurisdiction to decide the plaintiffs' pendent statutory claim. *Hagans* v. *Lavine,* 415 U.S. 528 (1974). Indeed, this Court is required to decide that statutory issue first in order to avoid, if possible, a constitutional adjudication. *Hagans* v. *Lavine,* supra at 549-550. *California Human Resources Department* v. *Java,* 402 U.S. 121, 124 (1971).[5] Since there is no "genuine issue

[5]In view of the fact that plaintiffs were seeking an injunction against the enforcement of an allegedly unconstitutional regulation, they moved for the convening of a three judge panel. 28 U.S.C. § 2281 (1970). However, the Supreme Court in *Hagans* v. *Lavine,* supra, specifically endorsed a practice which had been adopted in this district (*cf. Connecticut Union of Welfare Employees* v. *White,* 55 F.R.D. 481 (D. Conn. 1972)) by which a single judge first determines the merits of a statutory claim pendent to the constitutional claim. If he rejects that claim, then a three judge panel is convened to hear the constitutional issues. If he rules in favor of the plaintiff's statutory claim, then, of course, no three judge panel need be convened. This is the procedure which has been followed in this case.

as to any material fact," Fed. R. Civ. P. 56(c), this case is ripe for disposition on plaintiffs' motion for summary judgment.

III.

It is clear that although a State need not participate in the AFDC program, it must, if it does participate, operate its program in conformity with "several requirements of the Social Security Act and with rules and regulations promulgated by HEW." *King* v. *Smith,* 392 U.S. 309, 317 (1968); *Rosado* v. *Wyman,* 397 U.S. 397, 420 (1970). Plaintiffs contend that Regulation 335.16(VI) of the Connecticut Welfare Manual violates federal regulations which deal with the obligations and duties of a representative payee with regard to money received on behalf of OASDI beneficiaries. 20 C.F.R. §§ 404.1601-1610 (1974). Specifically, they argue that it is a violation of the letter and spirit of those regulations for the State to consider any part of the OASDI payments as available income to the representative payee. Rather, the OASDI benefits are only to be employed for the beneficiaries' "use and benefit." 20 C.F.R. § 404.1603.

The defendant, on the other hand, argues that the regulation in question does not violate the federal regulations dealing with the use of OASDI benefits. In support of its position, it points to 20 C.F.R. § 404.1607 (1974) which provides:

"If current maintenance needs of a beneficiary are

being reasonably met, a relative or other person to whom payments are certified as representative payee on behalf of the beneficiary may use part of the payments so certified for the support of the legally dependent spouse, a legally dependent child, or a legally dependent parent of the beneficiary."

From this regulation the defendant reasons that if a supervising relative, who is also a dependent parent of the beneficiary, can, in her discretion, use part of her child's OASDI benefits for her own support, then the State should be permitted to credit her with those payments when her needs under the AFDC program are being determined.[6] This I understand to be the substance of defendant's argument.

The defendant in relying upon § 404.1607 ignores the context in which it was written. That regulation is a part of a group of regulations, 20 C.F.R. §§ 404.1601-1610 (1974), which carefully set out the fiduciary responsibilities of a representative payee and clearly circumscribe the available uses of the OASDI benefits. Acting as a fiduciary, the representative payee is enjoined to use such benefits *"only for the use and benefit of such beneficiary* in the manner and for the purposes determined by him to be *in the beneficiary's best interest."* 20 C.F.R. § 404.1603 (1974). (Emphasis added). Furthermore, the payee is required by the terms of 20 C.F.R. § 404.1605 (1974) to conserve or invest on the beneficiary's behalf the OASDI payments which are "not needed for the current maintenance of the beneficiary except as they may be used pursuant to § 404.1607." Thus, while § 404.1605 does cross-reference to the regulation on which the State relies, that regulation must be read in light of the foregoing pro-

[6]Under Conn. Gen. Stat. Ann. § 17-320 (Add. Supp. 1974) a child may become liable for the support of his parents, if the parent is under the age of sixty-five and the child is able to provide such support. The regulation involved in this case has been promulgated pursuant to this statutory provision.

visions which, as discussed, carefully structure the payee's fiduciary responsibilities. When read in that light, it is clear that the power granted to the payee to use the "surplus" payments for the support of dependent relatives is directed to the payee's discretion, acting as a fiduciary of the beneficiary. The payee is not obligated to use the payments for the support of a dependent, but rather should only do so if she determines that that course of action is in the *beneficiary's* best interest. Indeed, under 42 U.S.C. § 408(e), a representative payee could be held criminally liable for conversion if she fails to use the payments for the beneficiary's benefit.[7]

The effect of the State regulation in question is to force the payee-dependent parent to exercise that discretion in favor of herself. In plaintiff's case, for example, the defendant has assumed that any OASDI payments in excess of what *he* has determined to be the current needs of the beneficiaries are available for the use of Mrs. Johnson. In turn, he then diminishes the amount of AFDC payments which Mrs. Johnson and her family receive by the amount of the "surplus." This places Mrs. Johnson in the position of either applying that "surplus" to meet her own bare subsistence needs and thus depriving her children of the benefits which the payments are designed to afford, or depriving herself of a bare subsistence in order to use the "surplus" for what *she,* as a fiduciary, determines are the current needs of her beneficiary-children. (Certainly it cannot be disputed that the children may have valid needs at a level above the standard which

[7]42 U.S.C. § 408(e) (1970) reads:

"Whoever —

(e) having made application to receive payment under this subchapter for the use and benefit of another and having received such a payment, knowingly and willfully converts such a payment, or any part thereof, to a use other than for the use and benefit of such other person; . . . shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or imprisoned for not more than one year, or both."

the State has set for AFDC purposes.) There is no real choice available in this impossible situation. Mrs. Johnson is coerced by the defendant's action into using the "surplus" to meet her own needs. To subject her to this coercion is in conflict with the federal regulations which clearly envision that the payee's discretion should be exercised freely. See *Collins* v. *White*, No. C69-830 (N.D. Ohio, Jan. 22, 1971). Regulation 335.16(VI) of the Connecticut Welfare Manual is therefore invalid under Article VI, Clause 2 (the Supremacy Clause) of the Constitution.

This conclusion is further buttressed by State Letter No. 1088 written on September 25, 1970 by John L. Costa, Commissioner of the Social and Rehabilitative Service. Stressing its importance by noting that the very problem involved in this litigation had been "a recurring issue," Commissioner Costa stated:

> "In view of the statutory requirement that a child's OASDI benefits be for his 'use and benefit' alone, the representative payee may not be required to use such benefits for other members of the child's family. Thus, if a child's monthly OASDI benefit exceeds his AFDC payment, the payee must have the option of removing the child together with his income from the AFDC family budget unit."[8]

Thus, in what must be regarded as the carefully considered interpretation of the statute by the federal administrator charged with overseeing the AFDC program, OASDI benefits may not be imputed as income to the representative payee or any other members of the beneficiary's family, if the payee

[8]In *McCall* v. *Shapiro*, 292 F. Supp. 268, 274 & n.4 (D. Conn. 1968), *aff'd* 416 F.2d 246 (2d Cir. 1969), this Court recognized that the problems presented in this action could be expeditiously and authoritatively resolved" by means of a definitive statement of the law from HEW.

exercises the option of removing the child and his income from the family assistance unit.[9] This administrative interpretation is entitled to great weight. In *Philbeck Timmers Chevrolet, Inc.*, 499 F.2d 971, 976-977 (5th Cir. 1974), the court discussed the weight to be given to staff opinions and formal interpretations of regulations issued by the Federal Reserve Board with regard to the Truth in Lending Act. In a footnote, the court made the following observation which is equally applicable here quoting *Allen M. Campbell Co. Gen. Con., Inc.* v. *Lloyd Wood Const. Co.*, 446 F.2d 261, 265 (5th Cir. 1971):

> [I]t is an axiom of judicial review that an administrative agency's interpretation of its own regulations must be accorded the greatest deference. *Udall* v. *Tallman*, 1965,

[9]In his letter, Commissioner Costa goes on to discuss two situations wherein all or part of the OASDI payments could be included as income to the family assistance unit:

> "However, where inclusion of the child in the AFDC family unit results in an advantage to the child which he would not otherwise have, e.g., the right to medical assistance, such right may be considered a 'use and benefit' to him and the OASDI statutory requirement would then be satisfied.
>
> "In the event the child is to be included in the AFDC payment, i.e., where it is clearly advantageous to the child, the social security benefit (excluding any part that may be conserved for the child's future needs under the State plan) would be considered as a resource to the family in determining need and the amount of the assistance payment. Also, in cases where OASDI benefits are in fact used for other members of the family, to this extent there is income to such family members, which must be considered like other income in accordance with applicable provisions of the State plan."

Thus, the Commissioner is suggesting that where a payee *chooses* to include the child beneficiary in the unit, the payee is using the OASDI payments to obtain extra benefits under the AFDC program. Such a use of the payments would be deemed for the "use and benefit" of the beneficiary.

The letter also suggests that where the payee actually exercises her discretion under 20 C.F.R. § 404.1607 (1974) to use "surplus" payments for her own use as a dependent relative that those payments actually made can be treated as income to her. However, I do not read the letter to suggest that the State may presume that the payee will exercise her discretion in that manner in the future by virtue of her personal use of the payments in the past. Such a presumption would have the self-fulfilling effect of forcing the payee to make personal use of the payments. As discussed in the text, this coercion would be impermissible.

380 U.S. 1, 16-17, 85 S.Ct. 792, 801, 13 L.Ed.2d 616, reh. denied, 380 U.S. 989, 85 S.Ct. 1325, 14 L.Ed.2d 283; *Bowles* v. *Seminole Rock & Sand Co.*, 1945, 325 U.S. 410, 413-414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700, 1702. When, as here, that interpretation obviously incorporates quasi-technical administrative expertise and a familiarity with the situation acquired by long experience with the intricacies inherent in a comprehensive regulatory scheme, judges should be particularly reluctant to substitute their personal assessment of the meaning of a regulation for the considered judgment of the agency. If the agency interpretation is merely one of several reasonable alternatives, it must stand even though it may not appear as reasonable as some other. (Footnotes omitted.) *Id.* at 977, n.11.

In the instant case, this deference is even further justified by the fact that this Court has found that Commissioner Costa's interpretation is, in fact, the most reasonable interpretation. See also *Trafficante* v. *Metropolitan Life Ins.*, 409 U.S. 205 (1972); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434 (1971); and *American Airlines, Inc.* v. *Remis Industries, Inc.*, No. 73-1960 (2d Cir. March 15, 1974).[10]

Furthermore, in both *Collins* v. *White*, supra, and *Howard* v. *Madigan*, supra, in which those courts were also faced with

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[10]In *Collins* v. *White*, supra, the Court discussed the weight which is to be accorded to a State Letter:

> "A State Letter from the Commissioner does not have the authority of a binding regulation; it does indicate, however, official Social Security policy and, as such, must be considered as one of the 'official issuances to the States' which help determine '. . . whether State plans (including plan amendments and administrative practices under the plans) originally meet, or continue to meet, the requirments for approval. . . .' 45 C.F.R. § 201.2. Its weight, therefore, while not decisive, does merit some consideration as to whether, in the view of the agency administering Social Security programs, there exists a conflict between the Federal and State policies." *Id.* at 5.

See *Howard* v. *Madigan*, 363 F. Supp. 351 (D. S. Dak. 1973).

similar State regulations imputing "surplus" OASDI benefits to the entire family unit, not only the supervising relative, it was concluded that such regulations were in conflict with the Social Security Act and were thus invalid under Article VI, Clause 2 of the Constitution. See also *Gilliard* v. *Craig*, 331 F.Supp. 587 (W.D. N.Car. 1971), *aff'd.* 409 U.S. 1119 (1972); *Bourque* v. *Commissioner of Welfare*, 6 Conn. Cir. 685, 308 A.2d 543 (1972).

I therefore hold that Regulation 335.16(VI) of the Connecticut Welfare Manual conflicts with the Social Security Act and the relevant regulations and thus is invalid under Article VI, Clause 2 of the Constitution. It consequently becomes unnecessary to reach the constitutional issues raised by the plaintiffs.

IV.

The defendant is permanently enjoined from enforcing that regulation as it now reads, so as to allocate to a representative payee any so-called "surplus" in the OASDI benefits received by her on behalf of the beneficiary, unless the payee chooses to include the beneficiary and his income within the family assistance unit. Furthermore, whenever the OASDI benefits exceed the needs of the beneficiaries as determined for AFDC purposes, the defendant shall automatically exclude such beneficiaries from the family assistance unit, unless the representative payee after being fully informed of the available alternatives, chooses to include the beneficiary within the assistance unit. Accordingly, the defendant shall immediately remove Frances and Marianne Johnson from the Johnson family assistance unit and shall recompute the level of AFDC benefits to which Cleo Johnson and her other eight children are entitled without reference to any OASDI payments made for the benefit of Frances and Marianne. The same shall be done for all other members of the class.

Plaintiffs have also requested the restoration of all past benefits to which they might now be entitled by virtue of this order. However, this Court is prevented from awarding such relief by *Edelman* v. *Jordan*, 39 L.Ed.2d 662 (1974).

SO ORDERED.

Dated at Hartford, Connecticut, this 11th day of October, 1974.

M. JOSEPH BLUMENFELD
United States District Judge

APPENDIX C

Sec. 17-320. Relatives obligated to furnish support.

When any person becomes poor and unable to support himself or herself and family, and has a husband or wife, and, if such person is under eighteen, a father or mother or, if such person is under sixty-five, a child able, jointly or severally, to provide such support, it shall be provided by them. If they neglect to provide it, the court of common pleas in the geographical area in which such poor person resides may order such relative or relatives to contribute to such support, from the time of serving the petition therefor, such sum as is reasonable and necessary and may issue execution monthly or quarterly for the same, which, when collected, shall be paid to the selectmen of the town or the conservator, husband or wife of the person needing support, for that purpose, as the court orders. Any such order for payment of support may, at any time thereafter, be altered or set aside by the court. Proceedings to obtain such orders of support shall be instituted by a verified petition with summons and order, in a form approved by the judges of the court of common pleas, of the husband or wife or any relative or the conservator of such poor person. Upon the filing of such petition, the judge shall cause a summons, signed by him or by the clerk or assistant clerk of said court, to be issued requiring such relative or relatives to appear in court, at a time and place named, for a hearing upon such petition. In the case of a person supported wholly or in part by a town, the welfare authority of the town shall notify the responsible relatives of such person of the amount of assistance given, the beginning date thereof and the amount of support expected from each of them, if any, and if any such relative does not contribute in such expected amount, the court of common pleas for the geographical area in which such town is located may order such relative or relatives to contribute

to such support, from the time of the beginning date of expense shown on the notice, such sum as said court deems reasonably within each such relative's ability to support such person. The court, or any judge thereof when said court is not sitting, may require the defendant or defendants to become bound, with sufficient surety, to the state, town or person bringing the complaint, to abide such judgment as may be rendered on such complaint. Failure of the defendant or defendants to obey any order made hereunder, after execution has been issued and returned unsatisfied, may be punished as contempt of court and the costs of commitment of any person imprisoned therefor shall be paid by the state as in criminal cases. When any person is found in contempt under this section, the court may award to the petitioner a reasonable attorney's fee and the fees of the officer serving the contempt citation, such sums to be paid by the person found in contempt. The jurisdictional limits of the court of common pleas shall not apply to proceedings brought under this section.

APPENDIX D

Subpart Q — Representative Payee

SOURCE: The provisions of this Subpart Q appear at 26 F.R. 11827, Dec. 9, 1961; 26 F.R. 11938, Dec. 14, 1961, unless otherwise noted.

AUTHORITY: The provisions of this Subpart Q issued under secs. 205, 227, 1102, 53 Stat. 1368, as amended, 79 Stat. 379, as amended, 49 Stat. 647, as amended; sec. 5, Reorg. Plan No. 1 of 1953, 67 Stat. 18, 631, 42 U.S.C. 405, 427, 1302.

§ 404.1601 Payments on behalf of an individual.

When it appears to the Administration that the interest of a beneficiary entitled to a payment under Title II of the Act would be served thereby, certification of payment may be made by the Administration, regardless of the legal competency or incompetency of the beneficiary entitled thereto, either for direct payment to such beneficiary, or for his use and benefit to a relative or some other person as the "representative payee" of the beneficiary. When it appears that an individual who is receiving benefit payments may be incapable of managing such payments in his own interest, the Administration shall, if such individual is age 18 or over and has not been adjudged legally incompetent, continue payments to such individual pending a determination as to his capacity to manage benefit payments and the selection of a representative payee.
[35 F.R. 14698, Sept. 22, 1970]

§ 404.1602 Submission of evidence by representative payee.

Before any amount shall be certified for payment to any relative or other person as representative payee for and on behalf of a beneficiary, such relative or other person shall

submit to the Administration such evidence as it may require of his relationship to, or his responsibility for the care of, the beneficiary on whose behalf payment is to be made, or of his authority to receive such payment. The Administration may, at any time thereafter, require evidence of the continued existence of such relationship, responsibility or authority. If any such relative or other person fails to submit the required evidence within a reasonable period of time after it is requested, no further payments shall be certified to him on behalf of the beneficiary unless for good cause shown, the default of such relative or other person is excused by the Administration, and the required evidence is thereafter submitted.

§ 404.1603 Responsibility of representative payee.

A relative or other person to whom certification of payment is made on behalf of a beneficiary as representative payee shall, subject to review by the Administration and to such requirements as it may from time to time prescribe, apply the payments certified to him on behalf of a beneficiary only for the use and benefit of such beneficiary in the manner and for the purposes determined by him to be in the beneficiary's best interest.

§ 404.1604 Use of benefits for current maintenance.

Payments certified to a relative or other person on behalf of a beneficiary shall be considered as having been applied for the use and benefit of the beneficiary when they are used for the beneficiary's current maintenance — i.e., to replace current income lost because of the disability, retirement, or death of the insured individual. Where a beneficiary is receiving care in an institution (see § 404.1606), current maintenance shall include the customary charges made by the institution to individuals it provides with care and services like those it provides the beneficiary and charges made for

current and foreseeable needs of the beneficiary which are not met by the institution.

§ 404.1605 Conservation and investment of payments.

Payments certified to a relative or other person on behalf of a beneficiary which are not needed for the current maintenance of the beneficiary except as they may be used pursuant to § 404.1607, shall be conserved or invested on the beneficiary's behalf. Preferred investments are U.S. Savings Bonds, but such funds may also be invested in accordance with the rules applicable to investment of trust estates by trustees. For example, surplus funds may be deposited in an interest or dividend bearing account in a bank or trust company or in a savings and loan association if the account is either federally insured or is otherwise insured in accordance with State law requirements. Surplus funds deposited in an interest or dividend bearing account in a bank or trust company or in a savings and loan association must be in a form of account which clearly shows that the representative payee has only a fiduciary, and not a personal, interest in the funds. The preferred forms of such accounts are as follows:

.....
(Name of beneficiary)

by

.....,
(Name of representative payee)

representative payee; or

.....
(Name of beneficiary)

by

.....,
(Name of representative payee)

trustee. U.S. Savings Bonds purchased with surplus funds by a representative payee for a minor should be registered as follows:

.....,
(Name of beneficiary)
....., a minor, for whom
(Social Security No.)
..... is representative
(Name of payee)
payee for social security benefits.

U.S. Savings Bonds purchased with surplus funds by a representative payee for an incapacitated adult beneficiary should be registered as follows:

.....,
(Name of beneficiary)
....., for whom
(Social Security No.)
..... is representative
(Name of payee)
payee for social security benefits.

A representative payee who is the legally appointed guardian or fiduciary of the beneficiary may also register U.S. Savings Bonds purchased with funds from title II payments in accordance with applicable regulations of the U.S. Treasury Department (31 CFR 315.5 through 315.8). Any other approved investment of the beneficiary's funds made by the representative payee must clearly show that the payee holds the property in trust for the beneficiary.
[37 F.R. 7881, Apr. 21, 1972]

§ 404.1606 Use of benefits for beneficiary in institution.

Where a beneficiary is confined in a Federal, State or private institution because of mental or physical incapacity, the relative or other person to whom payments are certified on behalf of the beneficiary shall give highest priority to expenditure of the payments for the current maintenance needs of the beneficiary, including the customary charges made by the institution (see § 404.1604) in providing care

and maintenance. It is considered in the best interests of the beneficiary for the relative or other person to whom payments are certified on the beneficiary's behalf to allocate expenditure of the payments so certified in a manner which will facilitate the beneficiary's earliest possible rehabilitation or release from the institution or which otherwise will help him live as normal a life as practicable in the institutional environment.

§ 404.1607 Support of legally dependent spouse, child, or parent.

If current maintenance needs of a beneficiary are being reasonably met, a relative or other person to whom payments are certified as representative payee on behalf of the beneficiary may use part of the payments so certified for the support of the legally dependent spouse, a legally dependent child, or a legally dependent parent of the beneficiary.
[31 F.R. 3394, Mar. 4, 1966]

§ 404.1608 Claims of creditors.

A relative or other person to whom payments under Title II of the Act are certified as representative payee on behalf of a beneficiary may not be required to use such payments to discharge an indebtedness of the beneficiary which was incurred before the first month for which payments are certified to a relative or other person on the beneficiary's behalf. In no case, however, may such payee use such payments to discharge such indebtedness of the beneficiary unless the current and reasonably forseeable future needs of the beneficiary are otherwise provided for.
[28 F.R. 7182, July 12, 1963]

§ 404.1609 Accountability.

A relative or other person to whom payments are certified as representative payee on behalf of a beneficiary shall submit

a written report in such form and at such times as the Administration may require, accounting for the payments certified to him on behalf of the beneficiary unless such payee is a court-appointed fiduciary and, as such, is required to make an annual accounting to the court, in which case a true copy of each such account filed with the court may be submitted in lieu of the accounting form prescribed by the Administration. If any such relative or other person fails to submit the required accounting within a reasonable period of time after it is requested, no further payments shall be certified to him on behalf of the beneficiary unless for good cause shown, the default of such relative or other person is excused by the Administration, and the required accounting is thereafter submitted.

§ 404.1610 Transfer of accumulated benefit payments.

A representative payee who has conserved or invested funds from Title II payments certified to him on behalf of a beneficiary shall, upon direction of the Administration, transfer any such funds (including interest earned from investment of such funds) to a successor payee appointed by the Administration, or, at the option of the Administration, shall transfer such funds, including interest, to the Administration for recertification to a successor payee or to the beneficiary.

[28 F.R. 7133, July 12, 1963]

APPENDIX E

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE

SOCIAL AND REHABILITATION SERVICE

WASHINGTON, D.C. 20201

SEPTEMBER 25, 1970

ASSISTANCE PAYMENTS
ADMINISTRATION

Our Reference: SRS-APA-PS

State Letter No. 1088

TO STATE AGENCIES ADMINISTERING APPROVED PUBLIC ASSISTANCE PLANS

Subject: Need of Child and Family in AFDC — Consideration of a Child's OASDI Benefits

There has been a recurring issue as to whether a child's benefits paid under the Federal Old-Age, Survivors, and Disability Insurance provisions of the Social Security Act (Title II) may be considered as a resource of the entire family unit for purposes of determining the eligibility and amount of assistance to be provided to other eligible individuals in a family under an approved State plan for AFDC.

The entitlement of a particular child to OASDI benefits is established by law. The fact that his benefits are paid to an adult, usually a parent or other relative appointed by the Federal agency as representative payee, does not alter the fact that the benefits belong to the child.

The payee for a child beneficiary, whether acting only under an appointment by the Federal agency involved or as a legally appointed guardian, is responsible for and can be required to report to the Federal agency about the use of the child's benefits.

Accordingly, these benefits are appropriately used only for the current needs of the child. Any remaining monies would appropriately be conserved for the future needs of the child.

If these benefits are insufficient to meet the State's defined standard of payment for such child, the child would be included in the AFDC assistance payment which would reflect the child's income and his unmet needs.

In view of the statutory requirement that a child's OASDI benefits be for his "use and benefit" alone, the representative payee may not be required to use such benefits for other members of the child's family. Thus, if a child's monthly OASDI benefit exceeds his AFDC payment, the payee must have the option of removing the child together with his income from the AFDC family budget unit.

However, where inclusion of the child in the AFDC family unit results in an advantage to the child which he would not otherwise have, e.g., the right to medical assistance, such right may be considered a "use and benefit" to him and the OASDI statutory requirement would then be satisfied.

In the event the child is to be included in the AFDC payment, i.e., where it is clearly advantageous to the child, the Social Security benefit (excluding any part that may be conserved for the child's future needs under the State plan) would be considered as a resource to the family in determining need and the amount of the assistance payment.

Also, in cases where OASDI benefits are in fact used for other members of the family, to this extent there is income to such family members, which must be considered like other income in accordance with applicable provisions of the State plan.

The same rule applies to any other benefits which are similarly restricted by law.

States are urged to discuss these benefits fully with the parents or relatives receiving the payments and to advise them of the options and advantages or disadvantages to the child of these options.

Sincerely yours,

JOHN L. COSTA
Commissioner